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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

No. 459

WESTINGHOUSE ELECTRIC CORPORATION,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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NATIONAL LABOR RELATIONS BOARD,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Westinghouse Electric Corporation, petitions for a writ of certiorari to review the judgment and decision* of the United States Court of Appeals for the Seventh Circuit entered in this case on May 27, 1970, enforcing a decision and order of the National Labor Relations Board.

### OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (App. A, *infra*, pp. A1-A13) is not yet officially reported. The decision and order of the National Labor Relations Board in the representation

*The decision of the Seventh Circuit Court of Appeals was entered on April 28, 1970.

case and in the unfair labor practice case are reported at 163 NLRB No. 96 and 171 NLRB No. 164 (App. C, D, pp. A16-A31, A32-A45).

## JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the Seventh Circuit, entered May 27, 1970 (App. B, pp. A14-A15), is invoked under the provisions of 28 U. S. C. § 1254(1).

## QUESTION PRESENTED.

The question presented is whether the National Labor Relations Board has the power to order the Employer to bargain with the Union as the representative of employees conceded by the Board to be supervisors within the meaning of the Act because the supervisors have not worked in a supervisory capacity for over 50% of their working hours in the prior year.

## THE STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 141 *et seq.*), which are involved in this case are set forth in Appendix E, pp. A46-A47.

## STATEMENT OF THE CASE.

Westinghouse Electric Corporation (herein called "Employer" or "Westinghouse") manufactures and sells turbine generating equipment. It employs individuals classified as Steam Service Engineers who go to the power plant location of customers and supervise the personnel

who perform the manual work involved in the installation or major overhaul and repair of this equipment under contracts entered into between Westinghouse and the customer. The equipment that is being installed under the supervision of these Steam Service Engineers ranged in price from $5,000 to $10,000,000 in 1964 (J. A.* 93).

On large installation or repair projects one Steam Service Engineer is designated the "lead" engineer, a non-official title which means that the particular Steam Service Engineer has been given overall supervision of the installation or major repair project (J. A. 155, 229, 242). Other Steam Service Engineers are assigned by the Westinghouse management to the project as assistants to the "lead" engineer and are assigned by the "lead" engineer to supervise the personnel performing the manual work on one phase of the project (for example, the electrical phase, mechanical phase, etc.) or to supervise all of the personnel performing the manual work on the second or third shifts if work is being performed on such shifts (J. A. 115-116, 230-232). On large projects there are usually four "assistants" to the "lead" engineer and on the largest project in 1964 there were eight such "assistants" responsible for supervising numerous craft employees (J. A. 114, 229-234).

The contracts between customers and Westinghouse involving both installation and maintenance and repair projects are referred to as being one of two types (J. A. 103-105, 214-215). One type is called a "labor contract," under which the lead engineer hires the crew of skilled tradesmen, referred to as the casual labor, who will perform the actual work (J. A. 214). The casual labor is supervised by Westinghouse by the lead and assistant engineers assigned to a given project.

* The abbreviation "JA" refers to the Joint Appendix which was filed with the Court of Appeals and which is a part of the certified record in this case.

On a "supervision only contract" the customer recruits the craftsmen either from his own work force or hires them specifically for the project. Under such a contract, Westinghouse provides Steam Service Engineers who supervise the craftsmen recruited by the customer (J. A. 214-215). Even on "supervision only" projects, certain specialists on the Westinghouse payroll, such as Bladers and Generator Mechanics, perform work under the supervision of the Steam Service Engineers, as the skills that they possess cannot be hired locally (J. A. 64).

**The Board's Representation Decision.**

The National Labor Relations Board found that the Steam Service Engineer was a supervisor within the meaning of the Act when he was acting as the "lead" engineer on an installation or major repair project under a "labor contract" between Westinghouse and the customer. This means that Westinghouse not only supplied the lead supervisor and his assistants, but also the personnel they supervised and who performed the manual work.

However, even though the "lead" engineer on such a project is a supervisor within the meaning of the Act, the Board ordered him included in the appropriate unit represented by the Union until he has functioned as a "lead" supervisor for over 50% of his working hours in the prior calendar year (a period of approximately 1,000 working hours or at least six months in time). The Board then added the admonition that the Union "may not represent any engineer with respect to his supervisory duties."

The Board based its decision on its holding in *Great Western Sugar Co.*, 137 NLRB 551 (1962)[1] which over-

1. Reversing *Great Western Sugar Co.*, 132 NLRB 936 (1961).

ruled *Whitmoyer Laboratories, Inc.*, 114 NLRB 749 (1955). In *Whitmoyer*, the Board had held that an employee who was a supervisor during a five-month seasonal peak but who returned to a rank and file position performing light maintenance duties during the remaining seven months should be considered ineligible to vote in a representational election held during the busy season and *excluded* from the unit on the ground that he had supervisory status within the meaning of the Act. In *Great Western Sugar* the Board reversed itself and held that employees who were supervisors during a three-month seasonal peak but who returned to rank and file positions during the other nine months, should be considered eligible to vote in a representational election held during the busy season and *included* in the unit because, even though they were supervisors, they should not be denied a voice in the selection of the bargaining representative who will negotiate with their employer the terms and conditions under which they will work when they were not supervisors.

Because the *Great Western Sugar* decision was upon rehearing, all of the Board members participated. Members Rodgers and Leedom dissented on the ground that to include supervisors in a unit of rank and file employees would require the employer to bargain with a union as the representative of such supervisors, contrary to Section 14(a) of the Act. The dissenting members stated:

> "As originally enacted in 1935, the Act did not expressly deal with the status of 'supervisors.' However, through a series of decisions, the Board interpreted the term 'employee' to include such individuals, thereby giving to supervisors the right to organize, to select representatives, and to bargain collectively with their employer, not only in units confined to supervisors, but also in units including rank-and-file employees as well. In 1947 Congress sought to reverse the effect of such decisions. It expressly ex-

cluded supervisors from the definition of the term 'employee.' Underlying this significant change was the fact that Congress was gravely concerned lest rank-and-file employees be interfered with or dominated by their supervisors, and lest employers lose the loyalty of, and control over, their supervisors.

"It is not shown that Congress, when changing the Act in this respect, ever specifically addressed itself to any issue respecting 'seasonal' supervisors. However, it seems clear to us that those considerations which impelled Congress to exclude supervisors from the 'employee' provisions of the Act derive their validity and force, not from the fact that a supervisor may, or may not exercise his authority for a relatively short 'campaign' or season, but rather from the fact that such supervisory status exists at all. For it is obvious that 'Management, like labor, must have faithful agents . . .,' and that 'no one, whether employer or employee, need have as his agent one who is obligated to those on the other side [of the bargaining table], or one whom, for any reason, he does not trust.'" Id. at 555, 556.

Under Section 14(a) of the Act, Congress provided that "supervisors" are not employees under the Act for purposes of collective bargaining 29 U. S. C. § 164(a). This Section of the National Labor Relations Act was enacted subsequent to this Court's decision in *Packard Motor Car Co.*, v. *NLRB*, 330 U. S. 485 (1947), in which this Court held that the term "employee" in the Act did encompass supervisory personnel. Justice Douglas, in his dissent in the *Packard* case, set out some of the problems that would confront employers and employees if supervisors were to be considered as employees under the National Labor Relations Act. Many of the problems that Justice Douglas foresaw were mentioned by Board Members Rogers and Leedom in their dissent in the *Great Western Sugar* decision. Both Members Rogers and Leedom felt that by requiring an employer

to bargain with a union as the representative of its supervisors, the Board was again presenting the problem of having "divided loyalties," as well as producing a result which Congress intended to avoid when it enacted Section 14(a).

The three members of the Board majority in *Great Western Sugar* dismissed the worries of the two dissenting members that the mandate of Congress was not being honored, noting that the supervisors were in the unit "only with respect to their rank and file duties."[2] *Great Western Sugar, supra* at 553.

The *Great Western Sugar* decision included *seasonal* supervisors in an appropriate unit along with rank and file employees. The case at bar does not involve seasonal supervisors and when the Board attempted to apply the principle announced in *Great Western Sugar* to the facts in this case, the Board was forced to invent an hours worked formula to determine which supervisors were to be included in the unit and for what period of time and which rank and file employees were to be excluded from the unit and for what period of time after they had performed supervisory duties. The time formula developed by the Board provided that:

(1) Supervisors would be included (lead engineers on "labor contract" projects) in the unit until they perform supervisory duties more than 50% of their working time in a twelve-month period; and that

(2) Rank and file employees would be excluded (all other engineers) from the unit after they cease to perform supervisory duties until they perform

2. A similar admonition was made by the Board in the case below. In its opinion the Board explained that if a union is selected "it may not represent any engineer with respect to supervisory duties." App. C *infra* at A31.

rank and file duties more than 50% of their working time in a twelve-month period. (App. C. pp. A30-A31.)

Under this formula, the period of time during which a supervisory employee would be included in the unit represented by the Union would be from the point in time when the employee acquires supervisory status until the point in time that the running average of working hours in such supervisory status during a year period passes the 50% point—*i.e.*, a period of six months or more.

Conversely, this 50% formula has the effect of denying employees who lose supervisory status the right to be included in the unit represented by the Union from the point in time when they ceased to have supervisory status to the point in time when the running average of the working hours in such rank and file status passes the 50% point—*i.e.*, a period of six months or longer.

It is most significant that regardless of the pattern of activity during the prior year, the point in time when an employee may enter the unit or is excluded therefrom is not determined when the employee assumes supervisory status or is demoted to rank and file status, but rather when the running average of his working hours in supervisory or rank and file status during the prior year exceeds or falls below 50%.

**The Board's Determination of a Refusal to Bargain Under Section 8(a)(5).**

Because Westinghouse considered the Board's determination of the supervisory status of the Steam Service Engineer incorrect for various reasons, including but not limited to the legal propriety of the newly invented 50% formula which is the basis for this petition, Westinghouse refused to bargain with the Union as the representative of

employees in a unit which included supervisors. A complaint alleging that Westinghouse had violated Section 8(a)(5) of the Act was issued by the Board's Thirteenth Regional Office and pursuant to a motion by the General Counsel, the Board denied a hearing (over the protest or Westinghouse)[3] and the record in the representation case was certified as the record in the refusal to bargain unfair labor practice case. A finding of refusal to bargain in violation of Section 8(a)(5) was then entered by the Board.

**Decision of the Seventh Circuit Court of Appeals.**

Westinghouse appealed the finding of the Board that it had improperly refused to bargain with the Union.[4] Westinghouse contended, *inter alia*, that the Board's order based on the new 30% formula would produce a result inconsistent with the clear wording of Section 14(a) in that it would require employees who became supervisors to remain part of the appropriate unit and represented by the Union until they had supervisory status for at least six months and possibly longer. The Court below, as the Board had done, said that the impropriety of including supervisors in the unit and requiring Westinghouse to bargain with the Union concerning such supervisors was avoided by the Board's admonition that the Union was not to bargain over the supervisory duties of the included supervisors:

> "The board considered whether every field engineer who worked as a lead engineer on a labor contract job at any time during the year covered by the record must

3. Westinghouse had asked to have the opportunity to show that the facts in existence at the time the alleged refusal to bargain occurred were quite different from those that existed at the time of the representation case hearing two years previously. This opportunity was denied the Petitioner (J. A. 59-61).

4. Jurisdiction by the Seventh Circuit was obtained by virtue of 29 U. S. C. § 160(f).

be excluded from the unit as a supervisor. . . . *The board resolved the issue by prescribing the 50% formula, but also stipulating that any bargaining representative may not represent any engineer with respect to his supervisory duties.*

* * * * *

"Westinghouse points out that under the board's formula, at any given moment a field engineer who is on an assignment *where he has supervisory duties* is nevertheless a member of the unit, and eligible to vote, if more than half his working time in the last 12 months has been spent on assignments where he did not have that authority. On the other hand, as happened in one instance at the time of the election in this case, a field engineer who is, at a given moment, assigned to a job *where he does not have supervisory duties* is not a member and not eligible to vote if he has spent a bare half of his working time in the last 12 months on assignments where he did have such duties.

"Obviously the situation of the field engineer who is sometimes assigned to a job where he has supervisory authority and sometimes to jobs where he does not is ambiguous, and there can be no perfect, all-weather, answer. We think that the board's formula in the peculiar circumstances here reasonably protects the ligitimate interests of the employer and employees." (Emphasis added.) (App. A, pp. A11-A12.)

The admonition by the Board, approved by the Court, that the Union may not bargain over the supervisory duties of the supervisors did not prevent the Union from actively interfering with the assignment of supervisory duties to the employees in the unit. In fact, the Union president, in a letter, instructed the employees in the unit not to engage in "supervisory duties" (J. A. 66-67). This is mentioned to emphasize that no admonition by the Board in its opinion can prevent the confusions Congress intended to prevent when it enacted Section 14(a) to remove *any obligation* on

the part of an employer to bargain with a union as the representative of supervisors in a separate unit or when included in units with rank and file employees.

Furthermore, the admonition of the Board, supported by the Court, makes it clear that both the Court below and the Board conceded that *supervisors within the meaning of the Act* will be in a unit represented by the Union and the employer is ordered to bargain with that Union as the representative of such supervisors. It is submitted that such an order is in violation of Section 14(a) of the Act since there is nothing in that Section of the Act which gives the Board power to include a supervisor in a unit for purposes of collective bargaining on the theory that he has performed rank and file duties during the prior year. On the contrary, Section 14(a) demonstrates that Congress intended to relieve employers of any obligation to treat a supervisor as an employee for purposes of collective bargaining and that the crucial factor is whether the individual is a supervisor rather than what portion of time he has spent in the prior year as a rank and file employee.

## REASONS FOR GRANTING THE WRIT.

The decision of the Seventh Circuit Court of Appeals in the instant case represents the first time that a Court has held that an employee, to be excluded from an appropriate unit, must not only have supervisory status under the Act, but must have had that status for at least 50% of his working hours during the prior year, meaning that an employee attaining supervisory status must remain in the unit and be represented by the union for at least six months and possibly longer.

The decisions of the National Labor Relations Board and the Seventh Circuit Court of Appeals presents to this Court several important questions. The first question

raised by the Seventh Circuit's acceptance of the Board's 50% formula is whether requiring an employer to bargain with a union for a unit of employees which includes "supervisors" contravenes the Congressional mandate of Section 14(a) that an employer is not required to treat "supervisors" as "employees" for purposes of collective bargaining. The importance of this question is demonstrated in part by the fact that in *Great Western Sugar*, upon which the Board relied in the instant case (see *supra*, pp. ); two members of the Board dissented on the ground that Section 14(a) of the Act removed any obligation on the part of an employer to bargain with a union for a unit of employees which included "supervisors."

Similarly, the decisions in the instant case must be considered in light of this Court's opinion in *Hanna Mining Co.* v. *District 2, Marine Eng. Ben. Assn.*, 382 U. S. 181 (1965), where this Court construed the intent of Congress in enacting Section 14(a) in the following manner:

> "The legislative history behind Section 14(a) revealed that Congress' propelling intention was to relieve employers from any compulsion under the Act . . . to bargain with any union of supervisory employees." *Id.* at 189.

Therefore, this case raises the important question of whether the National Labor Relations Board exceeded its authority under the Act when it ordered Westinghouse to bargain with the Union for a unit of employees which included supervisors in light of the statutory command that an employer is not obligated to treat "supervisors as employees for purposes of any law, either national or local, relating to collective bargaining." 29 U. S. C. § 164(a); *cf. H. K. Porter Company* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821 (1970).

Moreover, the decision below presents to this Court the problem of resolving the conflicts now presented between the view of the Seventh Circuit and the views of other Circuit Courts of Appeals.[5] The conflicts between the Seventh Circuit Court's approval of the 50% formula requiring an employer to bargain with a union when the unit includes supervisors and decisions in other Circuit Courts are of three separate types.

**1. A Conflict Exists Between the Decision Below and NLRB v. Metropolitan Life Insurance Co. (Second Circuit), Warner Company v. NLRB (Third Circuit), Eastern Greyhound Lines v. NLRB (Sixth Circuit), and Pacific Intermountain Express Co. v. NLRB (Tenth Circuit) Which Hold That an Employer Is Under No Obligation to Bargain With a Union if the Bargaining Unit Includes "Supervisors."**

Since the Court below has ordered the Petitioner to bargain with a Union as the representative of employees in a unit, which unit will include individuals conceded by the Board to be supervisors within the meaning of the Act, for at least a period of six months after such employees attain such status, its decision is in conflict with the decisions of the Second, Third, Sixth and Tenth Circuits. All of these Courts have specifically held that an employer is not required to bargain with a union on behalf

5. Only one Circuit Court has reviewed a decision where the Board applied the *Great Western Sugar* principles to require bargaining with a union when the unit included supervisors. *NLRB* v. *Florida Agricultural Supply Co.*, 328 F. 2d 989 (5th Cir. 1964). The Court in that case held that the supervisors were year around supervisors rather than seasonal supervisors and, hence, should be excluded. The Court's reversal of the Board's order was based on a different view of the facts and, hence, the Court did not discuss the legal impropriety of ordering an employer to bargain with a union when the unit includes supervisors.

of employees in a unit if such unit includes employees who are "supervisors" within the meaning of the Act.

In *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F. 2d 1169 (2d Cir. 1968), the Court said the following:

> "Persons who fall within this classification of 'supervisors' are consequently not entitled to the protections accorded 'employees' under the Act and *their employers are under no obligation to bargain with a union if the Union's bargaining unit includes such persons.* Therefore, if the persons whose status Metropolitan questions are supervisors, as defined by the Act, Metropolitan is not guilty of any Section 8(a) (5) and (1) unfair labor practice, and the Board's order should not be enforced by this court." (Emphasis added.) *Id.* at 1172.

In *Warner Company* v. *NLRB*, 365 F. 2d 435 (3d Cir. 1966), the Court said:

> ". . . Supervisors are excluded from the coverage of the term 'employee' in Section 2(3), and Section 14(a) provides that employers subject to the Act are not obligated to treat supervisors as employees for the purpose of any laws relating to collective bargaining. *Therefore, if a unit certified by the Board contains supervisory personnel, the unit is improper and the employer does not have to bargain with it.*" (Emphasis added.) *Id.* at 437.

In *Eastern Greyhound Lines* v. *NLRB*, 337 F. 2d 84 (6th Cir. 1964), the Court said:

> ". . . The single question involved is whether Eastern dispatchers are supervisors within the meaning of Section 2(11) of the National Labor Relations Act as amended 29 U. S. C. A. § 152(11). If they are, Section 14(a) of the Act . . . relieves Eastern of the duty to bargain with a union as their representative." *Id.* at 86.

In *Pacific Intermountain Express Co.* v. *NLRB*, 412 F. 2d 1 (10th Cir. 1969), the Court said:

> "'. . . The Company maintains that the refusal to bargain was justified because the employees in the bargaining unit, three line dispatchers of the Company's Denver Terminal, are all 'supervisors' within the meaning of Section 2(11) of the Act. The Board concedes that if the dispatchers are supervisors then 14(a) relieves the Company of any duty to bargain and constitutes a complete defense to the present unfair labor practice charge.'" *Id.* at 2.

This first fundamental conflict between the decision of the Court below and the decisions of other Circuit Courts justifies the granting of this writ.

**2. A Conflict Exists Between the Decision Below and NLRB v. Pepsi Cola (Fifth Circuit); and NLRB v. Inland Motor Corp. (Fourth Circuit) Holding That a "Supervisor" Within the Meaning of the Act Is Ineligible to Vote in a Representational Election.**

In *NLRB* v. *Pepsi-Cola*, 373 F. 2d 31 (5th Cir. 1968) and in *NLRB* v. *Inland Motor Corp.*, 322 F. 2d 457 (4th Cir. 1963) it was recognized that the Act requires that once an employee is found to be a "supervisor" within the meaning of the Act he becomes ineligible to vote in a representational election. However, the decision of the Seventh Circuit would allow a "supervisor" within the meaning of the Act to vote in a representational election if he has not maintained the status of supervisor for at least six months in the prior year.

### 3. A Conflict Exists Between the Decision Below and NLRB v. Leland-Gifford Co. (First Circuit) Holding That a Supervisor Who Loses Supervisory Status Is Immediately Eligible to Enter the Rank and File Appropriate Unit.

In *NLRB* v. *Leland-Gifford Co.*, 200 F. 2d 620 (1st Cir. 1952), the Court held that employees who lose their supervisory status and become rank and file employees enter the appropriate bargaining unit immediately and, hence, the union would be entitled to receive information from the employer concerning the wage rates paid such employees upon request. This view of the law is in direct conflict with the holding of the Court below that an employee who loses supervisory status must continue in a nonsupervisory status for at least six months before he may enter the appropriate unit and be represented by the Union.

## CONCLUSION.

Whether or not an employer is obligated to bargain with a union representing a unit of employees which includes "supervisors" within the meaning of the term as defined under Section 2(11) of the National Labor Relations Act, as amended, is a basic question of statutory construction. Because of the conflicts in the manner in which Section 14(a) of the Act has been interpreted by the Court below and by the First, Second, Third, Fourth, Sixth and Tenth Circuit Courts of Appeals, the Petition for Writ of Certiorari should be granted in this case.

Respectfully submitted,

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# APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 17004

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for review of an order of the National Labor Relations Board.

April 28, 1970

Before FAIRCHILD and CUMMINGS, *Circuit Judges*, and CAMPBELL, *Senior District Judge.*[1]

FAIRCHILD, *Circuit Judge.* These cross petitions for review and enforcement of an NLRB bargaining order test the board's designation of a bargaining unit and resulting certification. The principal issue is whether employees included in the unit are statutory supervisors. Refusal to bargain with the certified representative is undisputed, but a secondary issus is whether the employer made a sufficient showing of changed circumstances with respect to supervisory duties so that it was improper for

1. Senior District Judge Campbell of the North... District of Illinois is sitting by designation.

the board to enter summary judgment on the unfair labor practice charge of refusal to bargain.

The employer, Westinghouse, manufactures and services turbine generators and related equipment. The company's steam service department is responsible for installation and subsequent servicing. In this case we are concerned with the steam service engineers attached to two district offices with headquarters in Chicago. The districts are two out of five in the central area, one of the company's five areas in the United States.

There were at the time of the representation hearings, approximately twenty field engineers attached to the Chicago offices. Clearly outside the unit, but attached to these offices, are two clerical employees and five supervisory employees. The latter five are the Central Area Steam Service Manager, the Midwest and Chicago District Steam Service Managers, and two senior service assistants.

The field engineers here involved are salaried (receiving extra pay for overtime) and skilled in mechanical engineering, most having a mechanical engineering bachelor's degree and the rest having become skilled through on-the-job experience. They are ranked "A," "B," or "C" depending on their ability. About 95% of their time is spent outside the office installing or servicing steam-turbine equipment at customer locations. The jobs they work on vary in size from large installation projects taking over a year to complete and requiring 5 or 6 engineers and an additional work force of as many as 35 craftsmen, down to servicing jobs consuming a few hours and requiring only one or two engineers. Any of the field engineers may be selected as the "lead engineer" who will have overall responsibility for a given project. An "assistant engineer" is responsible for only a certain phase of the work, or for only one shift on large projects where work is done on more than

one shift. Assignments to such positions depend on the complexity of the job and the ability and availability of the particular engineers. Six out of the total number of field engineers are more often selected as lead engineers for larger projects. Occasionally engineers from outside the Chicago area are called in as lead engineers on particularly complicated projects.

Westinghouse uses two basic approaches in both installation and servicing work: (1) the "technical supervision" method and (2) the "labor contract" method. Under a "technical supervision" arrangement, Westinghouse supplies material and equipment at specified prices and the services of one or more engineers at an hourly rate, while the customer supplies the "casual labor" and any foremen or, on large projects, superintendents. On a labor contract project Westinghouse agrees, for a total fee, to perform a complete installation or service, supplying the materials, engineering service, and additional labor necessary to fulfill its contract. The craftsmen, sometimes referred to as casual labor, are hired by Westinghouse from local unions or through a labor broker. The evidence indicates that a labor contract project is ordinarily longer and more complicated than a technical supervision job.

The original petition for an election was filed December 7, 1964. On February 12, 1965, after a hearing, the regional director ordered an election in a unit found appropriate and defined as follows:

> "All professional Steam Service field engineers employed at the Employer's Chicago, Illinois district offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees."

Westinghouse sought review, and the board remanded for further hearing on the question whether the field engineers are supervisors. Hearings were held in April,

1965. On March 31, 1967, the board issued its decision on review, reported at 163 NLRB 723.

The gist of the board's decision was that except for special responsibilities imposed only on lead engineers assigned to labor contract projects, the field engineers are professional employees and the guidance or direction they give to the workmen on the project is not supervision in the statutory sense. The board found that the lead engineer on a labor contract project has special duties vis-a-vis the draftsmen employed by Westinghouse and by reason of these duties a field engineer, while engaged as a lead engineer, has supervisory status in the statutory sense. The board rejected the Westinghouse claim that every field engineer who performed such supervisory work for some part of the year should be excluded from the unit. Relying upon its own *Great Western Sugar Company*[2] decision the board decided to include in the unit and qualify as a voter each engineer who, during the preceding year, spent 50% or more of his working time (excluding leave or waiting time) performing non-supervisory duties. The board specified, however, that any bargaining representative may not represent any engineer with respect to his supervisory duties.

The election was held May 26, 1967, with 17 eligible employees voting. On a vote of 9-8, the regional director certified the Federation of Westinghouse Independent Salaried Unions as the bargaining representative of the unit.

In the unfair labor practice proceeding which followed refusal to bargain, Westinghouse opposed summary judgment and submitted an affidavit allegedly showing changed circumstances. The board granted summary judgment[3] and issued a bargaining order.

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2. 137 NLRB No. 551.
3. 171 NLRB No. 164.

Westinghouse contends that the following relationships are supervisory in the statutory sense: (1) the lead engineer's relationship with so-called casual labor on contract projects; (2) the lead and every other field engineer's relationship with the customer's employees on technical supervision projects; (3) the lead engineer's relationship with other field engineers on either type of project; (4) the other field engineers' relationship with casual labor on contract projects; and (5) the field engineers' relationship with bladers and generator mechanics, both Westinghouse employees, assigned to contract and technical supervision projects. Westinghouse further (6) challenges the board's concept that at any particular time a field engineer who is or has been assigned to a supervisory job is not deemed a supervisor for purposes of membership and eligibility to vote in a unit if 50% or more of his time during the preceding year has been spent on assignments where he was not a supervisor. Westinghouse also contends (7) that all the field engineers are managerial employees, whether or not they are supervisors.

The board agreed as to Westinghouse contention (1). (Relationship of lead engineers with casual labor on contract projects.) It found that lead engineers on contract projects perform special administrative duties, such as purchasing certain supplies, arranging through unions or labor brokers for employment of craftsmen and foremen, establishing payroll and accounting systems, paying project bills, and arranging in some instances to subcontract portions of the work. Although the board considered the duties of lead engineers on these projects primarily professional, as it considered the duties of all other field engineers, the board noted that the foremen directly supervising the craftsmen would seek approval of certain decisions by the lead engineers before making their own decisions final, and that union stewards have

presented grievances to lead engineers and accepted their decisions. The board considered the relationship to be supervisory in character.

The Westinghouse contentions other than (1) present the issues now before us.

(2) *Relationship of every field engineer with the customer's employees.*

We have no difficulty sustaining the board's decision on this issue. The board concluded that the field engineers, lead or otherwise, on technical supervision projects, give technical advice and instructions to the customer's foreman, who is the real supervisor of the customer's other employees. Beyond that, however, the fact that the people allegedly supervised are not Westinghouse employees prevent the field engineers from being their supervisors within the meaning of section 2(11) of the act, 29 U. S. C. § 152(11).[4]

Westinghouse argues that the customer "shares" these employees with Westinghouse. We think, however, that the board properly viewed the arrangement as one by which Westinghouse provides technical direction and guidance to the customer's employees in order that the customer may achieve its own objective through the effort of its employees, supervised, in the statutory sense, by the customer.

(3) *Relationship of the lead engineer to other field engineers assigned to the same project.*

There is ample support for the board's view. The engineers are professional employees. Any may be selected as the lead engineer for a project, although such assignments on the larger projects tend to be made to

4. *Illinois State Journal-Register, Inc.* v. *N. L. R. B.* (7th Cir., 1969), 412 F. 2d 37, 43.

one of six. The lead engineer has overall responsibility for the planning, scheduling, and successful completion of the work. Other field engineers are normally assigned, each to a particular phase of the work (such as piping, electrical controls, or mechanical work) or, where work is done on more than one shift, to a particular shift.

Except for the fact that the lead engineer is given wider authority and greater responsibility as to the particular project, there is no evidence that he exercises or has the type or degree of authority over the other engineers which would make him their supervisor in the statutory sense. As will be later noted, the board is not bound by testimony that the lead engineers "give directions" or "give instructions" to the others.

(4) *Relationship of the other field engineers to casual labor on contract projects.*

The field engineers have specialized technical competence. They plan, lay out, and prepare detailed schedules for the steps to be performed in the particular operation or phase to which they are assigned. They are markedly different from foremen in the commonly recognized sense. They surely give directions as well as advice, but such communications are necessary incidents of the application of their technical know-how. The record before use is opaque, and a picture of the activities of the field engineers which would be significant as to the degree and manner in which they direct (and may possibly be said to supervise) others does not come through with clarity.

We think that in testing whether the board's finding is adequately supported, it must be said that the technical character of the work of the field engineers, together with the varying nature and duration of their assignments, and the other circumstances, is sufficient substantial evidence to support the board's finding unless there

is evidence which virtually compels a contrary finding. It seems reasonable that the employer bear responsibility for deficiency or vagueness in this area of proof.

There is much testimony in the record indicating that in any of the relationships under consideration there is supervision in some sense. Witnesses often used some form of the verbs "instruct," "direct," and "supervise," or, on the other hand, "work under." There is enough play in the meaning of those terms that the board is not bound to equate them with supervision in the statutory sense.[5]

"Although there are many ways in which one person can 'direct' and 'assign' another, only if the individual 'directs' or 'assigns' *qua* employer, or *qua* representative of the employer, such as a foreman might do, does the individual 'supervise' within the meaning of Section 2(11)."[6]

Sec. 2(11) provides:

> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The determination of who is a supervisor "is a practical matter and one of fact in which the Board, in the exer-

5. Employees have been held not to be supervisors where they had specialized technical competence and gave detailed instructions to less knowledgeable employees in order that the latter may effectively perform the needed work. *NLRB* v. *American Oil Company* (7th Cir., 1967), 382 F. 2d 786, cert. den. 391 U. S. 906.

6. *International Ladies' Garment Workers' Union* v. *NLRB* (2nd Cir., 1964), 339 F. 2d 116, 121.

cise of its primary function as fact finder, must be permited 'a large measure of informed discretion.'"[7] As stated by the second circuit,

> "Inasmuch as infinite variations and gradations of authority can exist within any one industrial complex and any drawing of the line between the personnel of management and the rank and file workers may require some expertise in evaluating actual power distributions which exist within an enterprise, the Board's findings relative thereto are entitled to great weight."[8]

There is testimony (which makes this (4) a close question) that on labor contract projects a phase engineer has recommended, for final decision by the lead engineer, increasing or reducing the number of craftsmen working on his phase; that a phase engineer would report incompetency of a craftsman to the lead engineer and the latter would accept his word; that the phase engineer recommends to the lead engineer the authorizing of overtime and has authority to decide which individual will work overtime; that there have been instances where a phase engineer has recommended discharge of casual laborers, and the lead engineer has carried it out, and where phase engineers have transferred casual labor between them.

These instances do suggest supervisory status, although the record does not clearly establish a uniform pattern. It also appears that there are usually foremen on the job, and that the field engineer gives his directions to the foreman rather than directly to the man who is to

7. *NLRB* v. *Henry Colder Co.* (7th Cir., 1969), 412 F. 2d 750, 754; *NLRB* v. *Process Corp.* (7th Cir., 1969), 412 F. 2d 215, 218; See also *NLRB* v. *Security Guard Services, Inc.* (5th Cir., 1967), 384 F. 2d 143, 146.

8. *NLRB* v. *Metropolitan Life Ins. Co.* (2d Cir., 1968), 405 F. 2d 1169, 1172. See also *MEBA* v. *Interlakes SS Co.* (1962), 370 U. S. 173, 179, n. 6.

perform the task. Our reading of the somewhat unsatisfactory record does not lead us to the conclusion that the testimony above summarized compels a finding that the phase engineers are supervisors of the craftsmen in the statutory sense.

(5) *Relationship of field engineers to bladers and generator mechanics.*

The testimony shows that blading is a specialized type of work on turbines, although the details are not described. Until about the time of the 1965 hearings, two bladers had been attached to the Chicago office. A change was being made so that all bladers would be based in Philadelphia. Nothing was said at the hearings about supervision of bladers in the past nor under the new plan.

After the general counsel moved for summary judgment in the unfair labor practice proceeding, Westinghouse opposed the motion. It showed by affidavit that 7 bladers and 9 generator mechanics, based in Philadelphia, are assigned to both labor contract and technical supervision jobs, as required. There is nothing to indicate how frequently any of these men work on jobs in the districts involved here. Presumably they fill the needs for their type of work throughout the country, if not a wider market. It was asserted that when they are assigned, they "work under the immediate supervision of a field service engineer who determines their hours, signs their time sheets, assigns their work and evaluates their performance for such purposes as promotion and pay increases." Whether this differs from the relationship between the field engineers and the two bladers before the 1965 hearing does not appear. It would seem that if this relationship were really significant, Westinghouse would have presented evidence on it in 1965.

The Westinghouse letter of June 19, 1967 to the union, refusing to bargain unless so directed after court review, asserted that the board had erred, but did not suggest there had been a change in circumstances. Its answer in the unfair labor practice proceeding did not allege any change.

We conclude that the assertion made concerning bladers and generator mechanics in opposing summary judgment did not entitle Westinghouse to relitigate the status of the field engineers in the unfair labor practice proceeding.

(6) *The board's 50% formula.*

The board considered whether every field engineer who had worked as a lead engineer on a labor contract job at any time during the year covered by the record must be excluded from the unit as a supervisor. It noted that among six such engineers the percentage of time spent by each varied from 15% to 95%. Three spent more than half and three less. The board concluded that the latter "are primarily attached to the non-supervisory work force and that they share a substantial community of interest with their fellow non-supervisory engineers in the conditions governing the performance of unit work." It noted that when any engineer is a lead engineer on a labor contract project, his supervisory authority does not extend to other engineers. The board resolved the issue by prescribing the 50% formula, but also stipulating that any bargaining representative may not represent any engineer with respect to his supervisory duties.

The act gives the employer a right to have employees who are really supervisors excluded from bargaining units. But the board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect.

Westinghouse points out that, under the board's formula, at any given moment a field engineer who is on an assignment where he has supervisory duties is nevertheless a member of the unit, and eligible to vote, if more than half his working time in the last 12 months has been spent on assignments where he did not have that authority. On the other hand, as happened in one instance at the time of the election in this case, a field engineer who is, at a given moment, assigned to a job where he does not have supervisory duties is not a member and not eligible to vote if he has spent a bare half of his working time in the last 12 months on assignments where he did have such duties.

Obviously the situation of the field engineer who is sometimes assigned to a job where he has supervisory authority and sometimes to jobs where he does not is ambiguous, and there can be no perfect, all-weather, answer. We think that the board's formula in the peculiar circumstances here reasonably protects the legitimate interests of the employer and employees.

(7) *Alleged managerial status of field engineers.*

Although the act contains no exemption for "managerial" employees, they have long been excluded from coverage as a matter of broad policy.[9] As is set forth in *Illinois State-Journal-Register, Inc.* v. *N. L. R. B.*,[10] the fundamental tests to be used in determining whether an individual is such a "managerial" employee are: (1) whether the employee is "so closely related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer on the one hand and his fellow workers on the other" and (2) "whether the employee is formulating, determining and effectuating his employer's policies or has discretion, inde-

9. See Ford Motor Co., 66 NLRB 1317 (1946).

10. fn. *A*, *supra*.

pendent of an employer's established policy, in the performance of his duties.'"[11] While the engineers here exercise a certain amount of independent technical judgment, it is the district or area managers who effectively set and carry out management policy. Only minor on-the-job changes from the original plans are permitted without approval from headquarters. The lead engineers' authority to pledge the company's credit is limited to relatively small and routine purchases. We find substantial evidence on the record as a whole to support the board's finding that the responsibilities of the engineers are not managerial.[12]

The order of the board will be enforced.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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11. *Id.* at 41.

12. See *I. L. G. W. U.* v. *NLRB*, 339 F. 2d 116, 123-4 (2d Cir., 1964); Puget Sound Power & Light Co., 117 NLRB 1825, 1827 (1957); Westinghouse Electric Corp., 92 NLRB 871 (1950); and Palace Laundry Dry Cleaning Corp., 75 NLRB 320 (1947).

# APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner*,
*vs.*
NATIONAL LABOR RELATIONS BOARD, *Respondent*.
No. 17004.

## JUDGMENT.

Before: FAIRCHILD and CUMMINGS, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.[1]

THIS CAUSE was submitted to this Court upon a petition to review and set aside, and a cross-application for enforcement of, an order of the National Labor Relations Board, dated June 12, 1968, against Westinghouse Electric Corporation, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on April 24, 1969, and has considered the briefs and transcript of record filed in this case. On April 28, 1970, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Seventh Cir-

1. Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

cuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Westinghouse Electric Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ THOMAS E. FAIRCHILD
*Judge, United States Court of Appeals for the Seventh Circuit*

A True Copy:
Teste:

/s/ WALTER J. CUMMINGS
*Judge, United States Court of Appeals for the Seventh Circuit*

/s/ KENNETH J. CAMICK
*Clerk of the United States Court of Appeals for the Seventh Circuit*
By /s/ H. K. McCORMACK
*Deputy Clerk*

/s/ WILLIAM J. CAMPBELL
*United States District Judge sitting on the Court of Appeals for the Seventh Circuit.*

## APPENDIX C.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

| | |
|---|---|
| WESTINGHOUSE ELECTRIC CORPORATION, *Employer,* and AMERICAN FEDERATION OF TECHNICAL ENGINEERS, AFL-CIO, *Petitioner.*[1] | Case No. 13-RC-10446. |

## DECISION ON REVIEW, DIRECTION, AND ORDER.

On February 12, 1965, the Regional Director for Region 13 issued a Decision and Direction of Election in the above-entitled proceeding finding appropriate, in accord with the Petitioner's request, a unit confined to Steam Service Field Engineers[2] based at the Employer's Chicago, Illinois, district offices, excluding all senior service assistants and all other employees. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, as amended, the Employer filed a timely request for review of the Regional Director's unit determination, in which it questioned the employee status of the

1. Federation of Westinghouse Independent Salaried Unions was granted permission to intervene in the proceedings, before notice of hearing had issued on the basis of showing of interest among the requested engineers. However, although notified, it did not appear at the hearing, and has not since filed any documents in the case.

2. Hereinafter sometimes referred to as either "steam engineers" or as "engineers."

requested steam engineers on grounds that they perform duties of a managerial or supervisory character, and also asserted that, in any event, the unit was too narrow in scope because it excluded Electric Service Field Engineers. The Employer also concurrently filed a motion to reopen the record for the receipt of further evidence.

By telegraphic Order of March 16, 1965, the National Labor Relations Board granted the Employer's request for review to the extent it related to the employee status of the requested engineers. The Board further stayed the election pending Decision on Review and reserved ruling as to other issues raised by the request for review.[3]

On March 29, 1965, the Board, pursuant to the Employer's motion, remanded the proceeding to the Regional Director for the purpose of conducting a further hearing with respect to the alleged supervisory status of the requested steam engineers. On April 28 and 29, 1965, such further hearing was conducted before Stephen Rubin, Hearing Officer. The case was thereafter returned to the Board. Subsequently, the Petitioner filed a brief and the Employer filed a supplemental brief in which, among other things, the Employer moved that the petition be dismissed. For reasons set forth below, this motion is denied.

The Board has reviewed the rulings of the Hearing Officer made at the supplemental hearing and finds they are free from prejudicial error. The rulings are hereby affirmed.

The Board has considered the request for review and the entire record in this case with respect to the Regional Director's determination under review, and makes the following findings:

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3. The Board is now satisfied that, except for the matters on which review was granted, the Employer's request for review raises no material issues of fact or law. Accordingly, the Board hereby denies that part of said request for review as to which it heretofore reserved ruling.

## A. The Facts.

Through its nationwide Steam Service Department, the Employer is engaged in the sale, installation and service of the steam turbine, hydroelectric and related electric-generating machinery and equipment it manufactures. It has organized this part of its operation into five area divisions, with a number of district offices under each division.[4] Each district office has a staff of steam engineers employed to service customer orders within the district's territorial jurisdiction. The engineers here requested, approximately 18 in number, comprise the steam engineering complement based on the two Chicago, Illinois, district offices.[5] Although there is some history of bargaining for steam engineers assigned to other districts, there is none for the requested engineers.[6]

The engineers here involved are salaried, and have some specialized technical or professional knowledge and training in installing, servicing, or repairing Employer-manufactured steam-generating equipment. They all have some orientation in mechanical engineering, and some have

4. Each area division is headed by an area manager, and each district office is headed by a district manager. The latter immediately supervises the operations of the district office and, with the assistance of one or more senior service assistants (admitted supervisors) assigns to steam engineers within that office the work hereafter described.

5. Both these offices are located in the Merchandise Mart and are part of the Employer's Central Area Division.

6. The Employer has bargained and is currently bargaining with the Intervenor for steam engineers employed in the New York City, and the Detroit, Pittsburgh, and Cincinnati, districts. The latter three are part of the Central Area division. In each case, the engineers are part of larger units extending in scope to other salaried classifications. This bargaining history goes back many years and precedes the Employer's institution, in late 1963, of certain new engineering services of relevance to its position here.

academic degrees.[7] While all are employed in jobs similarily titled, senior employees with extensive on-the-job experience are rated on the internal records of the Employer as class "A" engineers. Others are rated as class "B" or class "C" engineers, the latter being the entrance rating. The Employer confines certain lead assignments involving major work projects to a group of its A-rated engineers, using the others for the routine service and repair work or for subordinate engineering posts on major projects.

The record shows that all job duties of the engineers are assigned with reference to specific customer job orders. When the Employer receives a customer job order it usually assigns a team of at least two steam engineers to perform the professional or technical work the order may call for, designating one as the "lead" engineer and any others as assistant or phase engineers.[8] A lead engineer has overall responsibility for the successful completion of the project work; and, his association with a particular project usually begins at the pre-job stage and terminates with the completion of the project.[9] An assistant engi-

7. The petition had originally described the engineers as "technicals." The Regional Director described them as "professionals." None of the parties disputed this description in any documents filed with the Board.

8. There is normally only one individual designated as a "lead" engineer for any customer work project, but there may be several assigned as phase or assistant engineers during the duration of a project, the precise number depending on the size of the project and/or the nature of the engineering problems involved.

The Employer specifies what duties each assistant engineer shall perform in advance of assignment to a given project. Among other things, it appears that some engineers have acquired special experience in particular phases of turbine installation and repair work (one example being the setting of controls), and are usually assigned such work when the order calls for it.

9. There is no contention, and no evidence, that "lead" men have or exercise any supervisory authority over assistant engineers on any projects.

neer's responsibilities, on the other hand, are normally limited to one phase or portion of the project work, and his association with a given project is usually limited to the particular phrase involved.

The major portion of the work assigned to steam engineers is performed at customers' sites.[10] Engineers perform such work without supervision.[11] Each such assignment involves either an order for the repair or servicing of existing power units, or one for the assembly and installation of new units. In all cases, the completion of the ordered project work requires the cooperative efforts of both steam engineers and crews of skilled labor—the former to supply the professional and technical guidance for the project work, and the latter to do the manual tasks all project work entails.[12] As indicated below, such manual craftsmen may be supplied either by the customer or by the Employer, depending upon the terms of the formal pre-job service contract between the customer and the Employer.

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10. At the pre-job stages of major projects, an engineer prepares a time, labor, and materials estimate and sits in with the Employer's officials at preliminary negotiations with a customer to give technical advice. The engineer has no authority, however, to commit the Employer in any way in such negotiations.

11. While management officials occasionally visit the jobsite, none of them are regularly present to supervise the project work.

12. The installation or servicing of the power plant or machinery customarily requires a combination of both the professional or technical know-how of the steam engineers and the physical efforts of laborers possessing craft-type skills of the kind associated with journeymen steamfitters, millwrights, mechanics, carpenters, plumbers, electricians, and the like. The record identifies the workmen who performed the manual work described herein as "union" journeymen. The record also indicates that, in all cases, the craft crews are of sufficient size to require, under union conditions, the designation of a journeyman to head the crew as a line foreman. Such foreman may supervise several types of craftsmen.

The Employer currently offers its customers two types of service arrangements. These are identified as: (1) a "technical supervision only" service; and (2) a "labor contract" service.[13] In providing "technical supervision" service, the Employer furnishes parts and materials at listed prices, and engineering guidance at specified hourly rates per engineer. The Employer does not assume any obligation to supply or pay for the manual labor for the project work, and it confines its liability for the job to "matters of technical judgment only." In providing "labor contract" service, however, the Employer, in return for a total project fee, takes on all responsibility for the project work, including the obligation to hire and pay all laborers under terms and conditions it may establish independently,[14] and to furnish all the specified materials and supplies. It gives the customer a completed job and an unconditional guarantee for the performance of the project work. The Employer makes either type of service available without regard to whether the work order entails installation of new machinery or the repair or maintenance of existing installations. It appears, however, that in practice the Employer contracts most new installation work on a labor contract service basis, and repair work on a technical supervision basis.

Engineers assigned to technical supervision projects work directly with and through a customer's project super-

13. This service was newly instituted in late 1963.

14. The necessary hiring arrangements are customarily made at the pre-job stages by Employer officials who contract to obtain the needed project workmen through labor suppliers in the project area. While the Employer sometimes uses a labor broker as a source of labor supply, it more usually arranges to obtain project workmen directly through building-trades labor unions. In either instance, its project workmen are employed under such union conditions as prevail in the project area and/or as are implemented by special negotiations.

visor and/or line foreman.[15] The lead engineer, with the assistance of phase or assignment engineers, and in cooperation with the customer, makes out the overall schedules, plans, and layouts of the specific tasks the craftsmen are to do and the sequence in which they are to do them. In making the requisite determinations, the engineers take into consideration the number of craftsmen the customer chooses to make available for the project work,[16] the nature of the pre-job construction plan and, once the work commences, the amount of work actually completed. The lead and/or the assistant engineer also inspect the work as it progresses. In performing these functions, the engineers advise the line foremen what their day-to-day work plans and schedules call for by way of manual labor, and implement this advice with other necessary technical instructions about the work. The line foreman, in turn, actively supervises and directs the individual laborers' work activity. The line foreman (not the engineer) regularly distributes and assigns the work tasks described in the engineers' work plans to the individual members of the labor crew. Such foreman also regularly issues to each such crew member any verbal instructions about the work; checks each individual's work performance (as distin-

15. On technical supervision projects, the line supervisors, like the individual workers, are employees of the customer. On smaller projects, the customer's project supervisor and line foreman may be the same individual. On larger projects, the customer may have a number of line supervisors with duties limited to a particular work crew, and an overall project supervisor with duties extending to the entire project. Where there is such a project supervisor representing the customer, the lead engineer works through him in issuing the plans, schedules, and supplementary professional or technical advice about the work.

16. On most orders of this type, the customer is usually able to supply the requisite craftsmen from among his regular plant employees. Should it become necessary for the customer to hire other employees, it normally obtains them from labor union sources in the area under terms and conditions it negotiates independently of the Employer.

guished from the total work result), and administers any reprimands or disciplinary measures when required.

Engineers at project sites operated under labor contracts have some job duties similar in nature to those of engineers assigned to technical supervision service projects. These similar duties include such tasks as the planning, scheduling, and laying out of the work tasks of the craft crews, and the inspection of the work as it progresses to insure a satisfactory work result. However, consonant with the additional obligations the Employer has assumed *vis-a-vis* its customers, lead engineers on these projects are given certain additional administrative duties and responsibilities. These special duties include purchasing construction materials and supplies from specified sources, as well as incidental materials; requisitioning from labor unions or other suppliers of labor the necessary craftsmen and line supervisors; establishing a payroll and project account system; paying all bills; and making any incidental arrangements for subcontracting of certain work, should the construction plan so specify.[17] In thus regulating the project work in accord with the Employer's contractual commitments, lead engineers have limited authority to vary certain parts of the construction plan and to direct occasional overtime work. Should they decide, however, that some course of action is necessary which would result in a substantial increase in the cost of the job, lead

17. For purposes of establishing a payroll system and doing the paper work necessary to requistion supplies, and to keep track of costs, the Employer furnishes each lead man with a kit containing such things as time slips and tax, insurance, and certification forms.

The Employer also provides the lead man with a project bank account in his [the engineer's] name to pay the wage and other previously contracted obligations of the Employer in connection with the project's operations. The lead engineer has authority to draw on this account also for extra purchases up to a preestablished amount (usually at least $500) without getting specific approval from the district office.

engineers must obtain the specific approval of higher management before proceeding.

While their duties on labor contract projects are primarily professional in nature, lead engineers, in performing their functions, may at times be called upon to make decisions of a supervisory character *vis-a-vis* the craftsmen doing the project work. Thus, there is evidence that line foremen, who immediately supervise the craft crews and make selective termination decisions in the first instance, seek the approval or concurrence of the lead engineer before making the decision final. The record further shows that union stewards representing the interests of project craftsmen have presented grievances to lead engineers of a jurisdictional nature and have accepted such engineers' determinations of the controversy involved.

Assistant engineers assigned to labor contract projects have responsibilities substantially identical to those of assistant engineers on technical supervision projects. Their primary function is to provide the lead man with technical support and guidance with reference to particular phases or portions of the construction work. In performing this function, they are expected to make the professional or technical judgments required in order to obtain a satisfactory work result. But, in so doing, they neither reprimand, discipline, nor otherwise take any independent action affecting the employee status of any individual workman; nor are they authorized so to do. Thus, according to undisputed evidence, the Employer has never directly or indirectly instructed or advised any engineers, except those assigned as lead men on labor contract projects, that their responsibilities for project work contemplate or permit their initiation or exercise of any disciplinary or other supervisory action over project craftsmen. Moreover, according to the undisputed testimony of engineers

who testified at the hearing, none except those who served as lead man on labor contract projects ever assumed he had any such supervisory authority, or ever attempted to exercise any such authority, in the course of planning or observing any project work, or in issuing technical instructions with respect to such work.

B. Conclusions.

As appears from the foregoing facts, the scope of an engineer's functions and the nature and extent of the judgments an engineer is called upon to make, varies from job to job, depending in part upon the type of contract involved, and in part upon whether the engineer's assignment is to a lead or to an assistant engineer position. In our view, the status of an engineer as a "supervisory" or "managerial" agent of the Employer, and his right therefore to be represented as an employee, varies accordingly.[18]

Contrary to the Employer's contention, the record does not justify a finding that engineers possess or exercise any managerial or supervisory authority, within the meaning of the Act, when serving on technical supervision projects either as lead or assistant engineers, or on labor contract projects as assistant engineers. We are persuaded, rather, that the duties and responsibilities engineers perform in such capacities are basically professional in nature. It is true, of course, that proper performance of all such engineering work requires a high degree of technical competence and the use of independent judgment with respect to matters of importance to the Employer's financial and

18. In evaluating the critical record facts, we have not regarded as relevant the title held by an engineer on any given work assignment. For it is clear that an individual's status under the Act is determined by his job content and responsibilities rather than by his title.

other managerial interests. But such characteristics are typical of the work which Section 2(12) of the Act defines as "professional" work.[19] So far as the record shows, the responsibilities thus entrusted to the independent judgment of the engineers involved do not include matters of policy such as the establishment of the Employer's contract with the customer, the determination of the contract's scope, or the making of any commitments which would entail a pledge of the Employer's credit in any significant amounts.[20] We therefore find no merit in the Employer's claim that some of the work responsibilities of lead or assistant engineers on technical supervision projects, or of assistant engineers on labor contract projects, are "managerial" in nature. Nor do we find that any of the regular duties of these engineers contemplates or requires the exercise, within the meaning of the Act, of "supervisory" authority over any of the project workmen whose work activity, as a group, the engineers plan for, lay out, and coordinate. When engineers are assigned by the Employer to technical supervision projects, it is conceded that on

19. Our review of precedents in this area reveals a number of cases in which the Board has found, over this Employer's objections, that certain of its professional or technical employees with work responsibilities of a comparable character, having no less important bearing on the Employer's financial or other managerial interests than those of the instant engineers, were not so closely allied to management as to preclude their inclusion in units of professional or technical employees. See, for example, our rulings in *Westinghouse Electric Co.*, 113 NLRB 337 (as to manufacturing engineers); *Westinghouse Electric Co.*, 97 NLRB 1271, 1272 (as to "method engineers"); and *Westinghouse Electric Co.*, 92 NLRB 871, 872 (as to a "tool engineer"). Other cases with rulings of revelance here include *Puget Sound Power and Light Co.*, 117 NLRB 1825; and *Western Electric Co.*, 100 NLRB 420.

20. As indicated by one or more of the cases cited *supra*, neither the fact that management officials may rely upon the engineers' recommendations in dealing and contracting with customers, nor the fact that they rely upon the engineers' time and material reports for purposes of billing customers, supports attributing "managerial" status to the engineers.

such projects the project workmen and their immediate supervisors are employed and paid by the customer—not the Employer. Therefore, and wholly apart from any other considerations, established precedent precludes a finding that such engineers on such projects are employed as "supervisors," in the statutory sense.[21] With respect to assistant engineers assigned to labor contract projects, the record evidence, summarized above, fails to establish either that they have been advised by the Employer's officials that they have any "supervisory" authority with reference to the project workmen, or that they customarily perform their duties in such a manner as to warrant attributing supervisory status to them.

We conclude, accordingly, that engineers on technical supervision service jobs (in either the lead or on assistant positions), as well as assistant engineers on labor contract service jobs, do not possess or exercise any managerial or supervisory authority. We shall therefore include within the unit found appropriate by the Regional Director,[22] all Chicago-based steam service field engineers who have heretofore served only as lead engineers or as assistant engineers on technical supervision projects, or as assistant engineers on labor contract projects.

The status of engineers assigned as lead men on labor contract projects poses a more difficult issue. It is true, as the Petitioner points out, that a substantial portion of their work is primarily professional in character. However, we are satisfied that they also have certain special duties and responsibilities, *vis-a-vis* the craftsmen employed by the

21. See, for example, *ILGWU (AFL-CIO)* v. *N. L. R. B.*, 339 F. 2d 116 (C. A. 2); *Textile Workers Union of America, et al.*, 139 NLRB 800, 802; and *Lindsay Newspapers, Inc.*, 130 NLRB 800, 802.

22. We have not disturbed the Regional Director's findings as to the appropriate scope of the unit. See footnote 3, *supra*.

Employer for the project work, that are clearly supervisory in character. In these circumstances we find, in agreement with the Employer, that when engaged as lead engineers on labor contract projects, the individuals so assigned have supervisory status within the meaning of the Act.

Remaining as a problem is the unit placement and eligibility of those individual engineers who, during the course of their employment, have been or presently are sometimes called upon to serve as lead engineers on labor contract jobs. Depending upon their availability and the Employer's requirements, those given the lead engineer assignments are selected from a pool of senior engineers who otherwise perform nonsupervisory engineering work.

The Employer seeks the wholesale exclusion of all within this pool of senior engineers. It would apparently justify such a class exclusion because of evidence showing that, over a 12-month business period covered by the record,[23] each of the six Chicago-based engineers then identified as part of the lead engineer pool, actually performed some supervisory lead work. However, an analysis of the individual work records of these engineers establishes a wide variation, as between individuals, in the proportion of the work year's time each spent in supervisory lead engineer work, from a high of about 95 percent to a low of about 15 percent. This analysis further establishes that three of the six engineers spent more, and the others less than, one-half

23. The record reveals that all parties adopted a 12-month business period as a basis in offering arguments on the basic issue as to whether *all* engineers are regularly called upon to perform supervisory duties for a substantial part of their work time. And the record otherwise persuades us that, in any event, use of a 12-month period for testing the status of any of the engineers here involved is equitable in view of the nature of the Employer's operations and the fluctuations in its engineering needs for supervisory lead work, on the one hand, or nonsupervisory work, on the other, which occur as a result of such external factors as customer choice. Accordingly, when speaking of a "work year" hereafter we shall be referring to a 12-month calendar period.

of their work year in such work.[24] We do not believe, therefore, that we should ignore the actual work experience of each individual engineer in resolving the unit and eligibility problems involved.

Nor, in the circumstances of this case, do we believe we should wholly deny the benefits of employee status to any engineer who acquires the major part of his work experience during a work year in nonsupervisory work, as here defined, simply because he has spent some of his time during such year in supervisory lead work. For it is clear that such engineers are primarily attached to the nonsupervisory work force and that they share a substantial community of interest with their fellow nonsupervisory engineers in the conditions governing the performance of unit work. Their situation is, we believe, similar to that of the seasonal supervisors we considered in the *Great Western Sugar Company* case,[25] and, under the concept of

24. The record shows that these wide variations in individual employment histories occurred despite the fact that in the period considered the Employer expended more of its total engineering hours in performing labor contract orders than it did in performing technical supervision orders. It is therefore evident that the factors which produced the wide disparity in the employment history of individual engineers were unrelated to the amount of work ordered on a labor contract basis. Accordingly, to the extent that the Employer claims that an excess of labor contract commitments over technical supervision commitments is relevant to a determination of the unit placement issue here involved, we find its argument to be without merit.

25. *Great Western Sugar Co.*, 137 NLRB 551. There the Board considered the question of whether individuals employed in a seasonal industry who spent the major portion of the work year as rank-and-file employees, but who were assigned supervisory duties for a remaining period, should be excluded from the rank-and-file unit and denied a voice in the selection of a bargaining representative. The Board there held that such individuals had a right to be included in the unit, but only with respect to their rank-and-file duties. It held further, that, as each of them had a substantial interest in the choice of a rank-and-file bargaining representative, each of them was eligible to vote in the election, irrespective of this job assignment as of the date to the election.

that case, the engineers here involved who are primarily attached to the nonsupervisory force should likewise be granted a right to representation limited to periods they are employed in nonsupervisory engineering work.

Thus, the record here reveals that the supervisory jobs which the senior engineers may be called upon to perform are not regularly and closely intermingled with their nonsupervisory work activity. Rather, depending on the Employer's assignment, their status shifts, full-time, from supervisory to nonsupervisory work for a measurable and continuous period of time, and their duties in each position are sharply demarcated. Moreover, when employed as supervisory leadmen, their right to exercise supervisory authority does not extend to any other engineers but is limited rather, to the nonprofessional craft employees hired for the project work.[26]

In accord with the principles established in the *Great Western Sugar* case, we shall therefore qualify as eligible to vote and include within the unit any engineer currently employed during the payroll period preceding the date of this Decision and on the election date who, during the 12 months preceding the date of this Decision, spent 50 percent

26. Here, as in *Great Western Sugar*, we have given due consideration to the fact that even with this limited grant of a right to representation to such engineers for non-supervisory work only, there may be problems for both the Employer and the Union based upon fears of "divided loyalty." As we noted in that case, this problem is common-place whenever an employer decides to promote a rank and file employee to be a supervisor, *i.e.*, when there is a shift in employee status, up or down. The problem would seem to be minimal here, if it exists at all, as the supervisory authority of engineers here involved is exercised with reference to a separately organizable and differently oriented group of temporary workers wholly outside the scope of the unit. We note, in this connection that, should a union seek to represent any group of craft employees of the employer in a unit including also any of the subject engineers, Section 9(b)(1) of the Act would preclude establishment of such a unit in the absence of the express consent of the professional engineers, as manifested in a Board election.

or more of his working time (excluding leave or waiting time, if any) performing nonsupervisory duties, as defined herein. This formula shall be determinative notwithstanding the type of assignment any given engineers might have at the time of the election, with the condition that, in the event a bargaining representative is selected, it may not represent any engineer with respect to his supervisory duties.

Direction.

The case is hereby remanded to the Regional Director for Region 13 for the purposes of holding and election pursuant to his Decision and Direction of Election, with the following amendments:

(1) the eligibility status of engineers the Employer has heretofore assigned as "lead" engineers on labor contract projects shall be determined in accord with the formula set out in this Decision; and (2) the payroll period for determining eligibility shall be that immediately preceding the date below.

Order.

The Employer's motion to dismiss the petition is hereby denied.

Dated, Washington, D. C. March 31, 1967.

FRANK W. MCCULLOCH,
*Chairman,*

JOHN H. FANNING,
*Member,*

GERALD A. BROWN,
*Member,*

SAM ZAGORIA,
*Member,*

National Labor Relations Board.

(SEAL)

# APPENDIX D.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

| | |
|---|---|
| WESTINGHOUSE ELECTRIC CORPORATION<br>and<br>FEDERATION OF WESTINGHOUSE INDEPENDENT SALARIED UNIONS. | Case No. 13-CA-7968 |

## DECISION AND ORDER

Upon a charge filed by Federation of Westinghouse Independent Salaried Unions, herein called the Union, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 13, issued a complaint and notice of hearing dated August 31, 1967, against Westinghouse Electric Corporation, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on June 13, 1967, the Union was duly certified by the National Labor Relations Board as the exclusive bargaining representative of the Respondent's employees in the unit found appropriate by the Board[1] and

1. 163 NLRB No. 96. 171 NLRB No. 164.

that on or about June 19, 1967, and thereafter, the Respondent has refused and is refusing to recognize and/or bargain with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 11, 1967, the Respondent filed its answer, admitting the allegations with respect to the filing and receipt of the charge, jurisdiction, commerce, and status of the Union as a labor organization but denying all other allegations of the complaint.

On November 30, 1967, the General Counsel filed with the Board a Motion to Transfer Proceedings to the National Labor Relations Board and Motion for Summary Judgment, asserting that there were no material issues of fact or law to be resolved by a Trial Examiner, and requesting an appropriate Decision and Order. Thereafter, on December 5, 1967, the Board issued an Order Transferring Proceeding to the Board and a Notice to Show Cause on or before December 20, 1967, why the Motion for Summary Judgment should not be granted. The date for filing answers to the Notice to Show Cause was thereafter extended to January 8, 1968. The Respondent thereafter filed an Answer to Notice to Show Cause and a Memorandum in Support of Answer to Notice to Show Cause.

Upon the entire record in this case, the Board makes the following:

*Ruling on the Motion for Summary Judgment.*

The record before us shows that on February 12, 1965, the Regional Director for Region 13 issued a Decision and Direction of Election in Case 13-RC-10446 in which he found appropriate for bargaining the following unit of employees:

> All professional Steam Service field engineers employed at the Employer's Chicago, Illinois district

offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

Pursuant to the Respondent's timely request for review and following the reopening of the hearing for the taking of additional evidence, the Board, on March 31, 1967, issued its Decision on Review, Direction, and Order[2] in which it remanded the case to the Regional Director for purposes of holding an election pursuant to his Decision and Direction of Election, as amended by the Board's decision. In its decision the Board found that only lead engineers (but not assistant engineers) on so-called "labor contracts" jobs were supervisors, and that lead engineers and assistant engineers on "technical supervision" jobs were not supervisors. Accordingly, the Board found eligible to vote and included within the unit engineers who in the 12 months preceding the decision spent more than 50 percent of working time in nonsupervisory duties, and further specified that the bargaining representative could not represent any engineer with respect to his supervisory duties.

Thereafter, a secret ballot election was conducted on May 26, 1967, with a majority of the valid ballots cast for the Union and with one challenged ballot which was sufficient to affect the results of the election. No objections were filed and on June 13, 1967, the Regional Director issued his Supplemental Decision on Challenges and Certification of Representative, in which the challenge was sustained and the Union certified as the exclusive bargaining representative of the employees in the unit. No request was made for review of the Supplemental Decision. By letter of June 15, 1967, the Union requested the Respondent to include the certified unit in the collective bargaining agreement which the parties had negotiated to cover other

2. Footnote 1, *supra*.

units at other locations. The Respondent, by letter of June 19, 1967, refused such coverage, challenged the appropriateness of the unit and the eligibility requirements established by the Board, and set forth its intention to deny recognition of the Union and the request for inclusion under the agreement unless directed to do so by a reviewing court.

In its Answer to the Notice to Show Cause the Respondent is in substance, that: (1) the underlying certification is invalid in holding that steam service engineers were neither supervisors nor managerial employees; (2) that the Motion for Summary Judgment is improper since the Respondent is prepared to produce new and previously unavailable evidence concerning the supervisory and/or managerial status of the steam service engineers; and (3) collective bargaining under the circumstances specified in the Board's Decision and Order would be impracticable and also inconsistent with concepts of collective bargaining.

In connection with its first contention, *supra*, the Respondent relies on material contained in the representation hearing, and which was fully considered by the Board in its Decision on Review, Direction and Order, footnote 1, *supra*. As it is well settled that the Respondent may not relitigate in a Section 8(a)(5) proceeding matters which were or could have been raised in the related representation proceeding,[3] the Respondent's contention presents no issue warranting a hearing.

For similar reasons the other contentions of the Respondent do not warrant a hearing before a Trial Examiner. The allegedly new and previously unavailable evidence upon which the Respondent would rely is set out in an affidavit of Robert T. Barnum, Midwest Area Manager of the Respondent's Steam Service Department. This affidavit, in

3. *Pittsburgh Plate Glass Company* v. *N. L. R. B.*, 313 U. S. 146; *Red-More Corporation d/b/a Disco Fair, et al.*, 164 NLRB No. 93.

the main, purports to show an increase in the work and number of hours in which engineers act as lead engineers on labor contracts. However, the formula for representation set out in our unit decision clearly recognized the possibility of such changes in the number of hours served as lead engineers, and any change in the ratio of time spent as lead engineers on labor contracts would affect only the proportion of the duties as to which they are entitled to representation, for they are not to be represented for their supervisory work. Consequently, there is no warrant for a hearing as such matter is unrelated to the current refusal to bargain charges. As for the "current" job descriptions for Steam Service Engineers "A", "B", and "C", only part of which are set out in the affidavit, we note that they provide that the particular engineer group "may involve direction", "may assume lead responsibility", or "occasionally directs", but there is no assertion that this is a principal or other than infrequent responsibility or that in fact the actual responsibilities of these engineers differ from those we considered earlier. Moreover, there is no indication that the "changed" job descriptions were not in effect while we were considering our earlier opinion or could not have been brought to our attention by appeal or motion for reconsideration before the election and certification. No such course was pursued by the Respondent, and we cannot presume this is a new change, made subsequent to the certification. The same defects hold with respect to the claim in Barnum's affidavit that since the close of the hearing certain bladers and generator mechanics have been assigned work on both labor contracts and technical supervision jobs under the "supervision" of engineers. Again the exact date of such assignment is not indicated nor is there any showing that the issue could not have been presented during our consideration of the initial hearing or by appeal therefrom. Unit determinations based

upon fully litigated representation proceedings are entitled to some degree of finality in subsequent related unfair labor practice cases. Accordingly, we conclude, there is no presentation of "new" material warranting a further hearing on this matter.

In connection with the third contention set out in the Respondent's Answer to the Notice to Show Cause, the Respondent also relies on the record of the representation proceeding and the affidavit of Barnum. For the reasons previously set forth none of this material warrants a further hearing in this proceeding or a reconsideration of our earlier decision in the representation proceeding. In addition, the Respondent attached to its Answer a letter purported to be from the Union's president to all units of the Union which the Respondent claims came to its attention after the close of the hearing. The letter discusses alleged efforts of the Respondent to place supervisory responsibilities on engineers and advises the engineers to refuse to perform such duties, or if the Respondent insisted, to do so only on the basis of employee willingness to accept removal from the unit. However, this letter in no way affects our previous decision which was based on the record of work performed by engineers, and responsibilities vested in them, in the particular unit under consideration. Therefore, nothing contained in this letter warrants a hearing before a Trial Examiner or a reconsideration of our earlier decision.

Accordingly, as we conclude there are no issues requiring a hearing before a Trial Examiner, the General Counsel's Motion for Summary Judgment is granted.

On the basis of the record before it, the Board makes the following:

## Findings of Fact.

### I. *The Business of the Respondent.*

The Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Pennsylvania, with plants and operations in all States of the United States engaged in the manufacture and service of electrical appliances and in providing technical services relating thereto. During the past year the Respondent has, in the course and conduct of its business operation, processed, sold and shipped diregtly from the State of Illinois to points outside the State of Illinois, goods and services valued in excess of $100,000, and has in the course and conduct of its business operation, received in the State of Illinois from points outside the State, goods and services valued in excess of $100,000.

The Respondent admits, and we find, that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. *The Labor Organization Involved.*

Federation of Westinghouse Independent Salaried Unions is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

### III. *The Unfair Labor Practices.*

#### A. *The representation proceeding.*

##### 1. *The unit.*

The following employees at the Respondent's Chicago, Illinois, District Office, constitute a unit appropriate for collective bargaining within the meaning of the Act.

All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, District offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

2. *The certification:*

On May 26, 1967, a majority of the employees of the Respondent in said unit, in a secret election conducted under the supervision of the Regional Director for Region 13, designated the Union as their representative for the purpose of collective bargaining with the Respondent, and on June 13, 1967, the Board certified the Union as the exclusive collective bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The request to bargain and the Respondent's refusal.*

On or about June 15, 1967, the Union by letter requested the Respondent to include the certified unit in the collective-bargaining agreement which the parties had negotiated to cover other units at other locations. In a letter dated June 19, 1967, the Respondent refused such coverage, challenged the appropriateness of the unit certified by the Board, and stated its intention to deny recognition unless otherwise directed by a reviewing court.[4]

4. Even if the Union's letter of June 15 is viewed as an imperfect bargaining demand, the Respondent's answer of June 19 clearly indicated the Respondent recognized it as a request to bargain, and the Respondent unequivocal refusal to recognize the Union made evident the futility of any further effort by the Union to seek bargaining with the Respondent. A union is not required to engage in futile gestures in the face of an employer's unequivocal refusal to bargain. See *American Compressed Steel Corporation*, 146 NLRB 1463, 1470-1471. Moreover, we note that in its Answer to the Notice to Show Cause, the Respondent makes no assertion or claim of imperfection with respect to the Union's bargaining demand.

Accordingly, we find that the Union was duly certified by the Board as the collective bargaining representative of the employees of the Respondent in the appropriate unit described above in the Board's certification and that the Union at all times since June 13, 1967, has been and now is the exclusive bargaining representative of all employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that the Respondent has, since June 19, 1967, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices Upon Commerce.*

The acts of the Respondent set forth in Section III, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy.

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom; and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if understanding is reached, embody such understanding in a signed agreement.

## Conclusions of Law.

1. Westinghouse Electric Corporation, is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Federation of Westinghouse Independent Salaried Unions, is a labor organization within the meaning of Section 2(5) of the Act.

3. All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, District offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 13, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 19, 1967, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of the Respondent in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Wesfinghouse Electric Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with Federation of Westinghouse Independent Salaried Unions, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, District offices; excluding all services assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. That the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Chicago, Illinois, District offices, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 13, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 13, in writing, within 10 days from the date of this Decision and Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C.

FRANK W. McCULLOCH, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member

SAM ZAGORIA, Member

(SEAL) National Labor Relations Board

5. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Order."

# APPENDIX

## NOTICE TO ALL EMPLOYEES

## PURSUANT TO

## A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not refuse to bargain collectively with Federation of Westinghouse Independent Salaried Unions, as the exclusive representative of the employees in the bargaining unit described below.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We Will, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, District offices; excluding all service assistants, office clerical

employees, guards, supervisors as defined in the Act, and all other employees.

WESTINGHOUSE ELECTRIC CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 881 U. S. Courthouse and Federal Office Building, 219 S. Dearborn Street, Chicago, Illinois 60604 (Tel. No. 353-7572) if they have any questions concerning this notice or compliance with its provisions.

## APPENDIX E.

### PERTINENT PROVISIONS OF NATIONAL LABOR RELATIONS ACT.

SEC. 2. When used in this Act—

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 30 1970
E. ROBERT SEAVER, CLERK

No. 458

# In the Supreme Court of the United States

OCTOBER TERM, 1970

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

ARNOLD ORDMAN,
*General Counsel,*
*National Labor Relations Board,*
*Washington, D.C. 20570.*

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 459

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. Petitioner manufactures and services turbine generating equipment and related products (Pet. App. A18). It employs a group of service engineers whose duties are largely nonsupervisory. On occasion, however, some of the service engineers act as lead engineers on "labor contract" projects, and thus exercise

[1] Petitioner offers its customers two types of service arrangements—"technical supervision only" service and a "labor contract service." In providing the former, petitioner furnishes parts and materials at listed prices, and engineering guidance at specified hourly rates per engineer; it does not assume any obligation to supply or pay for the manual labor for the project work. In providing "labor contract" service, however, petitioner, in return for a total project fee, takes on all respon-

supervisory powers within the meaning of Section 2(11) of the National Labor Relations Act (29 U.S.C. 152(11))—(Pet. App. A25–A28). The Board, applying the principle enunciated in *Great Western Sugar Co.*, 137 NLRB 551,[3] included in the bargaining unit of service engineers those engineers who performed such part-time supervisory work, provided that they had spent at least 50 percent of their working time during the preceding 12-month period performing nonsupervisory duties (Pet. App. A29–A31).[4] The sole question presented by the petition is whether the Board in so acting exceeded its authority under Section 9(b) of the Act (29 U.S.C. 159(b)) to determine the appropriate collective bargaining unit.

2. The decision of the court of appeals sustaining the Board's unit determination and enforcing the Board's order requiring petitioner to bargain with the Union[5] is correct and does not conflict with a decision

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sibility for the project work, including the obligation to hire and pay all laborers under terms and conditions it may establish independently, and to furnish all the specified materials and supplies (Pet. App. A21).

[3] In that case, the Board held that individuals employed in a supervisory capacity who spent the major portion of the work year as rank-and-file employees but who were assigned supervisory duties for a remaining period had a sufficient interest in the choice of a rank-and-file bargaining representative to warrant their inclusion in the unit with respect to their rank-and-file duties.

The Board added, however, that, "in the event a bargaining representative is selected, it may not represent any engineer with respect to his supervisory duties" (Pet. App. A31).

[4] The Union, the American Federation of Technical Engineers, ultimately won the election and was certified as the bargaining representative of the service engineers (Pet. App. A33–A34).

of any other circuit. As the court below noted, "in the peculiar circumstances here," where a service engineer is sometimes assigned to a job with supervisory authority and sometimes to a job without, there can be "no perfect, all-weather, answer" (Pet. App. A12). The court properly concluded that the Board's 50 percent formula represents a reasonable balance between the competing interests of the employer and the employees. Employees who spend more than half their time in nonsupervisory work, and who, therefore, share a substantial community of interest with their fellow nonsupervisory engineers, are not to be denied the benefits of the Act because they sometimes serve in a supervisory capacity (Pet. App. A29–A30).

Furthermore, the Board's unit determination is consonant with Section 14(a) of the Act.[1] While that provision permits an employer to refuse to bargain collectively over supervisors in the performance of their supervisory duties, it does not prevent individuals who occasionally act as supervisors from enjoying the

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[1] As the Board found, the "supervisory jobs which the senior engineers may be called upon to perform are not regularly and closely intermingled with their nonsupervisory work activity": rather, their status is full-time, from supervisory to nonsupervisory work for a period of [illegible] time, and their duties in each [illegible] time. Moreover, when employed [illegible] projects, their right to exercise [illegible] extend to any employees in the unit, but is limited to the [illegible] professional craft employees hired for the particular project (Pet. App. A30).

Section 14(a) provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

benefits of the Act for those clearly demarcated periods when they function as employees without supervisory status. The Board's accommodation in this case between Section 14(a) and the other provisions of the Act was reasonable and should not be disturbed.

The decisions cited at pages 13–15 of the petition all involve situations where the court found that the individuals involved were in fact full-time supervisors and they are not in conflict with the decision below. Also not in conflict is the decision referred to by petitioners (Pet. 16) in *National Labor Relations Board v. Leland-Gifford Co.*, 200 F. 2d 620 (C.A. 1), which merely holds that an individual with genuine supervisory powers does not lose his supervisory status simply because, due to a change in plant operations, he is temporarily assigned to rank-and-file work.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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